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JOHN T. FEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 272

POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL, an unincorporated association, et al.,
Appellants,

vs.

C. H. ELLE CONSTRUCTION CO., a corporation,
Appellee.

POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL, an unincorporated association, et al.,
Appellants,

vs.

J. R. SIMPLOT COMPANY, a corporation, as such, and J. R. SIMPLOT COMPANY, a corporation, doing business under the firm name and style of SIMPLOT FERTILIZER CO.,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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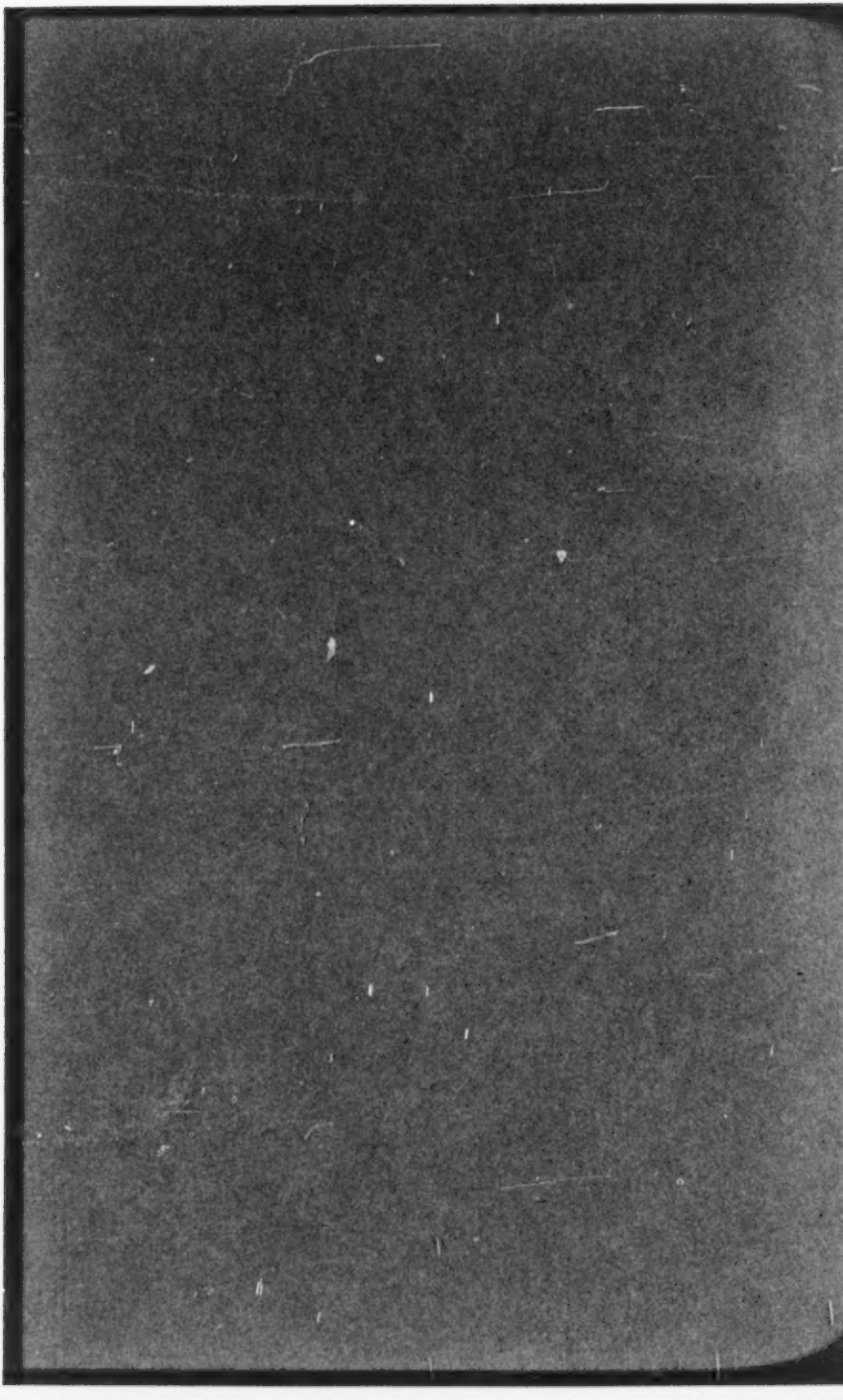

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POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL, an unincorporated association, et al.,
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J. R. SIMPLOT COMPANY, a corporation, as such, and J. R. SIMPLOT COMPANY, a corporation, doing business under the firm name and style of SIMPLOT FERTILIZER CO.,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellees make little attempt to meet appellants' contention that the jurisdiction of the Idaho courts over these cases was preempted by the National Labor Relations Act. Instead they assert that the preemption issue was not before the Idaho Supreme Court because:

(1) Appellants did not file cross-appeals from the judgments of the District Court in their favor.

(2) The Idaho Supreme Court did not view the cases as involving a "labor dispute".

(3) Appellants made no attempt to submit the case to the National Labor Relations Board.

Only the second of these contentions rises above the puerile, and it is disposed of adversely to appellees by *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 479-480, 75 S. Ct. 480, 487.

I

The District Court rejected appellants' contention that it had no jurisdiction because the field was preempted by the National Labor Relations Act, but entered judgments in favor of appellants on the merits. See Jurisdictional Statement, 13-14. It is hornbook law that

> "an appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435, 44 S. Ct. 560.

Appellees cite no case suggesting that a different rule prevails in Idaho, nor have we been able to find any.

Further, Idaho follows the usual rule that "Objections to the jurisdiction of the court are never waived." *Aram* v. *Edwards*, 9 Idaho 333, 337, 74 Pac. 961. See Idaho Code Annotated (1948), 5-611; Vol. 2, Supplement, p. 501.

Finally, and in any event, the Idaho Supreme Court did consider and decide the issue of preemption by the National

Labor Relations Act. It said (Jurisdictional Statement, 27-28):

> "The contention of the Union that the Court had no jurisdiction of the matter and that all such questions as are here in dispute have been preempted, supplanted and covered in the Anti-Injunction Acts, 47 U.S. Stat. at Large 70, 29 U.S.C.A. 101 to 115, and the National Labor Relations Act, 29 U.S.C.A. 151 to 161 inclusive, has been decided by this Court adversely in *State* v. *Casselman*, 69 Idaho 237, 205 P. 2d 1131; *Poffenroth* v. *Culinary Workers Union*, Local No. 328, 71 Idaho 412, 232 P. 2d 968; *Tarr* v. *Amalgamated Ass'n etc.*, 73 Idaho 223, 250 P. 2d 904. Cases from other jurisdictions holding that state courts have jurisdiction are: *Milwaukee Boston Shoe Co.* v. *American Federation of Hosiery Workers*, 59 N.W. 2d 762; *General Building Contractors Assn.* v. *Local Unions (Pa.)*, 87 A. 2d 250; *G. H. and E. Freydberg, Inc.* v. *International Ladies Garment Workers*, 128 N.Y.S. 2d 470; *Fashioncraft, Inc.* v. *Halpern et al. (Mass.)*, 48 N.E. 2d 1; *Goodwins, Inc. et al.* v. *Hagedorn et al.*, 303 N.Y. 300, 101 N.E. 2d 697; *Opera on Tour, Inc.* v. *Weber et al.*, 285 N.Y. 348, 34 N.E. 2d 349; *Roth* v. *Local Union No. 1460 (Ind.)*, 24 N.E. 2d 280; *Ostroff* v. *Laundry & Dye Works (Wash.)*, 225 P. 2d 419; *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U.S. 722, 86 L. Ed. 1143; *United Const. Workers* v. *Laburnum Const. Corp.*, 347 U.S. 656, 98 L. Ed. 1025. Many other cases with a similar holding could be cited."[1]

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[1] In their Motion to Dismiss appellees state:

> "The Supreme Court of Idaho did hold the state court's jurisdiction had not been supplanted by the Federal Labor Act, and cited cases in support from its Court as well as this Court." (Motion, p. 9)

Again, they say:

> "The Idaho Supreme Court found the contention of the Union that it had no jurisdiction in the matter and that all questions

II

The contention that jurisdiction over these cases is not preempted by the National Labor Relations Act, because the Idaho Supreme Court did not view them as involving a "labor dispute", might have presented a substantial issue prior to the decision of this Court in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 473, 479-480, 75 S. Ct. 480, 484, 487. But precisely that argument was made in that case, and it was rejected by the Court.

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that were in dispute had been pre-empted and supplanted and covered by the Federal Act not well taken." (Motion, p. 12)

This last statement is, however, immediately followed by the following assertion:

> "The questions the appellants seek to raise in the instant matter were not expressly passed upon by the court below for the reason the appellants never saw fit to cross-appeal from the decision of the Idaho Trial Court." (Motion, p. 12)

Elsewhere appellees say:

> "the federal questions sought to be raised were not, in either of such cases, timely or properly raised or expressly passed upon by the court below, * * *." (Motion, pp. 1-2)

And again:

> "While it is true that the appellants herein stated in their Answer that the matters in controversy were exclusively within the jurisdiction of the National Labor Relations Board, the appellants did not, after the trial court had handed down its memorandum decision and Findings of Fact and Conclusions of Law and decree were entered in each case, file a cross-appeal. Hence the only matters directly before the Supreme Court of the State of Idaho were those matters and things contained in the Assignment of Errors as set forth in the briefs prepared by the appellees here." (Motion, pp. 9-10)

III

Appellees assert that because appellants did not seek to "submit the matter to the National Labor Relations Board * * * the decision of the Idaho Supreme Court rests on an adequate non-federal basis * * *." (Motion, p. 13. See also pp. 5, 14).

However, it was the appellees who sought relief against the appellants; and since their asserted grievances fell within the statutory jurisdiction of the federal Board (Jurisdictional Statement, 15-17), it was up to appellees to show that they "had applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so." *Building Trades Council* v. *Kinard Construction Co.*, 346 U.S. 933, 74 S. Ct. 373. Appellees have never attemped to make such a showing, nor could such a showing be made. It is, to the contrary, quite clear that these cases were within the federal Board's statutory jurisdiction and that it would have exercised jurisdiction. See Jurisdictional Statement, 15-17.

* * * * * * * *

Since the filing of the Jurisdictional Statement, the National Labor Relations Board has handed down a "Decision and Determination of Dispute" in *Local 562, etc., and St. Louis County Water Co.*, 116 NLRB No. 137 (September 18, 1956). Since the facts of that case strikingly parallel those of these, the Board's decision is reprinted as Appendix A, *infra*, pp. 7-11, for the convenience of the Court.

CONCLUSION

Inasmuch as this case presents no issue of substance not squarely and recently decided by the Court, we respectfully suggest that the Court may wish to reverse the judgments

below *per curiam*, without submission of further briefs or oral argument.

Respectfully submitted,

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APPENDIX A

116 NLRB No. 137 D-65
St. Louis, Missouri

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 14-CD-59

LOCAL 562, BUILDING AND CONSTRUCTION AND METAL TRADES DIVISION, AFFILIATED WITH UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

and

ST. LOUIS COUNTY WATER COMPANY

DECISION AND DETERMINATION OF DISPUTE

On December 8, 1955, St. Louis County Water Company, herein called the Company, filed a charge with the Regional Director for the Fourteenth Region, alleging that Local 562, Building and Construction and Metal Trades Division, affiliated with United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, herein called the Union, had engaged and was engaged in certain unfair labor practices within the meaning of Section 8 (b) (4) (D) of the Act.

Thereafter, pursuant to Section 10 (k) of the Act and Sections 102.71 and 102.72 of the Board's Rules and Regulations, the Regional Director investigated the charge and provided for an appropriate hearing upon due notice. The hearing was held at St. Louis, Missouri, on May 24, 1956, before Harry G. Carlson, hearing officer. All parties appeared at the hearing and were accorded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.[1] The rulings of the hearing officer made at the hearing are free from prejudicial error and are hereby affirmed. All parties were likewise afforded opportunity to argue orally before the hearing officer, and to file briefs.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

1. The Company is engaged in commerce within the meaning of the Act.

2. The Union and the Intervenor (Local 335, Utility Workers Union of America, AFL-CIO, herein called the Utility Workers) are each labor organizations within the meaning of the Act.

3. *The Dispute:* In 1955, the Company signed a contract with a general contractor for the construction of a new water purification plant (called the South County plant), which required the installation of several miles of water mains from the Meramec River to the purification plant and beyond to a final discharge point. The Company planned to install these water mains with its own employees, represented by the Utility Workers, and the construction contract for the purification plant accordingly excluded this operation.

At an all-party conference on November 16, 1955, Union Representative Seaton advised the Company, the general

[1] At the hearing the parties stipulated to incorporate the record of a related hearing in Case No. 14-CC-92, held before Trial Examiner Lee J. Best on April 16 and 17, 1956.

contractor, and the various subcontractors on the project (including a plumbing and piping subcontractor who was under agreement with the Union and employed union members) that the water main installation was work which historically and "rightfully" belonged to the Union. He demanded that such work be done by members of the Union or else the Union would have nothing to do with any of the other piping work at the project. The Company refused to yield to the Union's demand, and proceeded to lay the water mains with its own employees.[2]

The Union thereupon established three picket lines at and near the project on December 7, 1955. The picket lines continued until January 5, 1956, when they were withdrawn as a result of a District Court stipulation. The picketing caused a cessation of all operations by the general contractor and his subcontractors. The Union admits that it was responsible for the pickets and the resultant strike by employees of the general contractor and the subcontractors. The Union further admits that the purpose of the picket lines was because "other people were doing our work" and "maintenance workers [of the Company] was installing new construction."

Contentions of the Parties

The Company contends that by the above conduct the Union violated Section 8 (b) (4) (D) of the Act. The Union neither filed a brief nor made oral argument on the record, and its defense, if any, therefore does not appear.

Applicability of the Statute

In the present proceeding under Section 10 (k) of the Act, the Board is required to find that there is reasonable cause to believe that Sections 8 (b) (4) (D) has been vio-

[2] The Company based its position in part upon its contract with the Utility Workers, the certified representative of its production and maintenance employees, which provided that none of the Company's work should be contracted out if its complement of employees was qualified to do the work.

lated before proceeding with a determination of the dispute out of which the alleged unfair labor practice has arisen.

As set forth above, it is clear that the Union, by means of the picket lines and the ensuing strike, engaged in and induced employees to engage in a strike, with an object of forcing the Company to assign the disputed work to the Union's own members rather than by doing the work with Company employees, represented by the Utility Workers. We are satisfied, and find, that there is reasonable cause to believe that the Union thereby violated Section 8 (b) (4) (D). We further find that the dispute involved in this proceeding is properly before us for determination under Section 10 (k) of the Act.

Merits of the Dispute

When the Union demanded that the Company assign the work of installing the water mains to its own members, employees of the Company who were not members of the Union were performing that work. The dispute therefore was one over the Company's assignment of work to its own employees rather than to a contractor or subcontractor employing workmen belonging to the Union. It is well established that an employer is entitled to make such assignments of work to his own employees free of strike pressure by a labor organization, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.[3] The Union has no such order or certification here.

The Board finds, accordingly, that the Union was not lawfully entitled to require the Company to assign the work of installing the water mains in connection with its new South County plant to members of the Union rather than to employees of the Company, represented by the Utility Workers.

DETERMINATION OF THE DISPUTE

Upon the basis of the foregoing findings and the entire record in this case, the Board makes the following determi-

[3] *International Longshoremen's and Warehousemen's Union (Juneau Spruce Corporation)*, 82 NLRB 650.

nation of dispute pursuant to Section 10 (k) of the Act:

1. Local 562, Building and Construction and Metal Trades Division, affiliated with United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, and its agents are not and have not been lawfully entitled to force or require St. Louis County Water Company to assign the work in dispute to members of the Union rather than to the Company's own employees.

2. The aforesaid Union shall, within ten (10) days from the date of this Decision and Determination, notify the Regional Director for the Fourteenth Region, in writing, whether or not it accepts the Board's determination of this dispute, and whether or not it will refrain from forcing or requiring St. Louis County Water Company, by means proscribed in Section 8 (b) (4) (D) of the Act, to assign the work in dispute to members of the Union rather than to employees of the Company.

Dated, Washington, D. C.

BOYD LEEDOM, Member
PHILIP RAY RODGERS, Member
STEPHEN S. BEAN, Member
(SEAL) NATIONAL LABOR
RELATIONS BOARD